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Planning and zoning regulations are uniformly treated as an exercise of the police power. Like a primitive taboo, however, there is embedded in the law relating to such land-use controls a rule that the police power cannot constitutionally be exerted for aesthetic objectives alone.[1] Like other relics of legal antiquity, this rule has been qualified and distinguished, given only lip-service by most courts and disregarded by a few. This paper demonstrates that there is nothing in the concept of the police power as understood today that requires the courts thus to discriminate against aesthetic regulation and explores the scope of permissible aesthetic control measures.

The words "aesthetic" and "aesthetics" are used here in a specialized, colloquial sense. According to the dictionaries, they refer to the appreciation or criticism of the beautiful, the philosophy or science of taste or of the perception of the beautiful. For planners and land developers, however, aesthetic controls are regulations of the external appearances of uses and structures. To a degree, external appearances are determined by functional and structural requirements. The only control of appearances available here would be to prohibit the use entirely or to require that it be masked or screened, as by fences or planting. On the other hand, where the use or structure itself can be laid out or built or decorated in a variety of ways, rules can prescribe one kind of external appearance or arrangement in preference to another. In either case these are the measures planners and builders loosely call aesthetic controls. Behind most such measures, presumably, lies some notion of taste or harmony, of

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[1] *E.g.*, Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867 (1909).

a desirable conformity or variety; however, their practical application may represent but a rudimentary striving for the ideal of the beautiful.

Today there is nothing in the concept of the police power that makes it necessarily improper, invalid, unconstitutional to regulate the external appearance of uses and structures. The correctness of this statement can be demonstrated without reliance upon judicial novelties. As Chief Justice Taney said in 1847, the police powers of the states "are nothing more or less than the powers of government inherent in every sovereignty. . . ."[2] "It may be said in a general way," wrote Mr. Justice Holmes in 1911, "that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[3]

Neither of the cases just cited is a land-use or planning case. The point is that their broad language neither says nor suggests that regulations of aesthetic significance are in a different category from other regulations of property and human activity. Nothing in the language of the fourteenth amendment justifies any judicial discrimination against regulation of the exterior appearance of buildings as against regulation of their interior arrangement under city building codes. Logically, aesthetic controls should be entitled to the same presumption of constitutionality, and the same judicial deference to the legislative judgment, as any other law.

To say that there is nothing in the general principles of the police power that forbids aesthetic regulation may be only negative support for such measures, but more positive support can be shown. The cases sustaining planning and zoning in general under the police power implicitly, and sometimes expressly, recognize aesthetic considerations as permissible police power objectives. Arguably all planning and zoning legislation is fundamentally aesthetic in some sense. By upholding planning and zoning in general, the courts have, in effect, approved some measure of aesthetic regulation. Indeed, the phrase "city planning" was first applied to the "city beautiful" movement of the early 1900's. Whether or not all land-use regulation is essentially aesthetic, it is obvious that the objectives of many such measures are aesthetic, and the courts have recognized this from the beginning.

An aesthetic element is, perhaps, most apparent in what is called "bulk" zoning: the regulation of the size, shape and placement

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2 License Cases, 46 U.S. (5 How.) 504, 582 (1847).
3 Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911).

of buildings on the land. That the objectives of such controls are at least in part aesthetic appears from the opinion in *Gorieb v. Fox*,[4] where the United States Supreme Court upheld an early set-back regulation. Mr. Justice Sutherland noted among the reasons advanced in support of the ordinance "that front yards afford room for lawns and trees, keep dwellings farther from the dust, noise and fumes of the street, add to the attractiveness and comfort of a residential district, create a better home environment, and, by securing a greater distance between houses on opposite sides of the street, reduce the fire hazard . . . ."[5]

"Use" zoning has also been treated by the courts as having an aesthetic component. In *State ex rel. Civello v. City of New Orleans*,[6] an ordinance prohibiting commercial uses in a residential zone was upheld by the Louisiana Supreme Court in an opinion that emphasized health-and-safety and nuisance arguments but went on to acknowledge, approvingly, the aesthetic significance of such measures. Said the court, "If by the term 'aesthetic considerations' is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of general welfare."[7]

Neither *Gorieb* nor *Civello* are recent, "new-hatched, unfledged" decisions. They rank among the classics of zoning law. The latter was quoted at length in *Village of Euclid v. Ambler Realty Co.*,[8] while the former relied on and confirmed the *Euclid* decision, which it followed by only a few months.

The regulation challenged in *State ex rel. Saveland Park Holding Corp. v. Wieland*[9] required a determination by village officials, before issuance of a building permit, "that the exterior architectural appeal and functional plan of the proposed structure" would not be so at variance with those of the neighborhood "as to cause a substantial depreciation of property values." The ordinance was held valid; preservation of property values, the court said, is within the scope of the police power.

Another conspicuous endorsement of amenities legislation came

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[4] 274 U.S. 603 (1926).

[5] *Id.* at 609.

[6] 154 La. 283, 97 So. 440 (1923).

[7] *Id.* at —, 97 So. at 444.

[8] 272 U.S. 365 (1926).

[9] 269 Wis. 262, 69 N.W.2d 217 (1955), *cert. denied*, 350 U.S. 841 (1955). In Highway 100 Auto Wreckers v. City of West Allis, 6 Wis. 2d 637, 96 N.W.2d 85 (1959), the Wisconsin court remarked that in *Saveland* it had "declined to say that a police power ordinance, in that case, zoning, may not be grounded on aesthetic considerations alone." *Id.* at —, 96 N.W.2d at 92.

a few years later, when New York's highest court had before it an ordinance of the town of Rye prohibiting front-yard clotheslines. The particular clotheslines were hung with rags as a protest against high taxes, but even with this free-speech factor added, the Court of Appeals upheld the ordinance. In the opinion, the question of a plausible relationship between front-yard clotheslines and the public health and safety was brushed aside, and the ordinance was sustained "as an attempt to preserve the residential appearance of the city and its property values."[10]

The property values rationale is not new, and has long been used in support of comprehensive zoning in general. More than thirty years ago, a distinguished member of the California bar wrote:

> On analysis the primary objects of zoning are found to be, not so much the protection of public health and safety, as the protection of the value and usefulness of urban land, and the assurance of such orderliness in municipal growth as will facilitate the execution of the city plan and the economical provision of public services.
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> Zoning results chiefly from an appreciation of the "inter-dependence of adjoining parcels of land" in urban centers; from a realization that the value and usefulness of each parcel, not only to the owner but to the community, is vitally affected by the use made of the adjoining parcel. It is predicated upon a basic principle of urban land economics, that a certain conformity in use stabilizes and insures the value of land.[11]

Nor is there any novelty in the proposition that the police power extends to the general welfare, or rather that the general welfare is an independent category of the police power, in addition to and beyond health, safety and morals. In *Chicago, B. & Q. Ry. v. Illinois*,[12] in 1906, the United States Supreme Court so held, and with particular reference to measures for the economic advantage of the community.

In the *Saveland* and *Stover* opinions, the respective courts recognized openly the relationship between aesthetics and economics and based their approval of aesthetics legislation on that relationship.

It would be an exaggeration to say that the courts have now ceased to discriminate against specifically aesthetic legislation. The

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10 New York v. Stover, 12 N.Y.2d 462, —, 191 N.E.2d 272, 274 (1963), *appeal dismissed for want of a substantial federal question*, 375 U.S. 42 (1963). The opinion also invokes the notion of a "visual nuisance" to support its conclusion. The nuisance approach, which is an unnecessary complication at best, is criticized in Comment, *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81, 90 (1964).

11 Landels, *Zoning—An Analysis of its Purposes and its Legal Sanctions*, 17 A.B.A.J. 163, 165 (1931).

12 200 U.S. 561 (1906).

opinion of the United States Supreme Court in *Berman v. Parker*[13] upheld the use of the eminent domain power for urban renewal in the District of Columbia against an attack based on the due process clause of the fifth amendment and a theory of the police power limited almost literally to health-and-safety measures. Appellant's argument was summarized by the Court: "To take for the purpose of ridding the area of slums is one thing; it is quite another, the argument goes, to take a man's property merely to develop a better-balanced, more attractive community."[14]

Berman v. Parker, however, not only affirms a broad police power in general, but specifically says that there is nothing unconstitutional in using the police power to make a city more beautiful:

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[15]

While *Berman* is cited as authority in *Saveland*, *Stover* and *Oregon City v. Hartke*,[16] it would seem to be more accurate to describe *Berman* not as a precedent in any strict sense for these decisions but as an excuse to reconsider and re-work older legal doctrine. In *Saveland*, the court, in discussing the effect of *Berman v. Parker* on the traditional rule that land use controls could not be exercised for aesthetic objectives alone, said it was now "extremely doubtful that such prior rule is any longer the law."[17]

The most forthright opinion approving aesthetic considerations alone as a legitimate basis for the exercise of the police power, is that of the Oregon Supreme Court in *Oregon City v. Hartke*. Here the city had made no provision in its zoning for automobile wreckers and had prosecuted a "prior nonconforming" establishment for an unauthorized extension of its premises. The question before the court was "whether a city can wholly exclude a use of property on the ground that the use is offensive to aesthetic sensibilities," and

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[13] 348 U.S. 26 (1954).

[14] *Id.* at 31.

[15] *Id.* at 33.

[16] 240 Ore. 126, 400 P.2d 255 (1965).

[17] State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, —, 69 N.W.2d 217, 222 (1955).

the answer was in the affirmative.[18] The opinion is written largely in terms of the expansion of the police power and today's higher community standards, and is particularly significant in that its argument is not based primarily on protection of property values. Furthermore, although the automobile junk-yard is one of the classic examples of the "visual nuisance," the court did not resort to a nuisance rationale.

In California, aesthetic controls are in a kind of limbo. Although cities have provided for them, there is no controlling legal authority either approving or denying their validity. The California courts, however, have been generous to comprehensive planning and zoning ever since *Miller v. Board of Public Works*,[19] and this generosity has not been limited to general principles. "The development of numerous procedural rules, including presumptions, rules as to burdens of proof, rules of review and as to administrative finality," has made successful challenge of land-use regulations increasingly more difficult.[20]

In California the validity of aesthetic regulation of land use is dependent on the scope of the police power. The authority of California local governments to enact police-power measures is not dependent on state enabling legislation. The California Constitution provides that "any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws."[21] Under this direct grant, California cities passed zoning measures before there were any state zoning acts on the books.[22] It is not significant, therefore, that neither the Planning and Zoning Act[23] nor the Subdivision Map Act[24] authorizes aesthetic controls. So long as such controls are not in conflict with state legislation, and they are not, cities and counties are competent to prescribe them—if they are within the scope of the police power.[25]

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18 240 Ore. 126, 400 P.2d 255, 261 (1965).

19 195 Cal. 477, 234 Pac. 381 (1925), *appeal dismissed*, 273 U.S. 781 (1927).

20 Rodda, *The Accomplishment of Aesthetic Purposes under the Police Power*, 27 So. CAL. L. REV. 149, 150 (1954). See, *e.g.*, Clemons v. City of Los Angeles, 36 Cal. 2d 95, 222 P.2d 439 (1950).

21 CAL. CONST. art. XI, § 11. For chartered cities, this language is supplemented by the "home rule" section that gives them exclusive legislative authority "in respect to municipal affairs," CAL. CONST. art. XI, § 8.

22 *E.g.*, *In re* Hang Kie, 69 Cal. 149, 10 Pac. 827 (1886); *Ex parte* Quong Wo, 161 Cal. 220, 118 Pac. 714 (1911).

23 CAL. GOV. CODE §§ 65100-65907.

24 CAL. BUS. & PROF. CODE §§ 11500-11641.

25 There should be no question of the state's having "pre-empted the field" as to zoning, in view of the express declaration of legislative intent "to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over zoning matters" (CAL. GOV. CODE § 65800), and, as to subdivision

Recent decisions have not narrowed the state supreme court's declaration, more than thirty years ago, that "the police power is no longer limited to measures designed to protect life, safety, health and morals of the citizens, but extends to measures designed to promote the public convenience and general prosperity."[26] This language is as broad as that of other courts that have upheld aesthetics legislation. Nevertheless, the 1909 decision in *Varney & Green v. Williams*[27] inhibits any sweeping statement that aesthetic controls are valid police-power regulations in California. Although never expressly overruled and still cited, *Varney & Green* has been qualified and limited by subsequent decisions, and should not be a serious obstacle to upholding aesthetic legislation.[28]

In *Varney & Green v. Williams* the controversy was occasioned by the enactment of an ordinance, by what was then the town of East San Jose, prohibiting signs other than those advertising goods and services available on the premises where the sign was displayed.[29] In striking down the ordinance the court said:

> Such prohibition, involving a very substantial interference with the rights of property, can be justified, if at all, only to the extent that the subject-matter of the legislation is embraced within the police power of the state. Bearing in mind that the ordinance does not purport to have any relation to the protection of passers-by from injury by reason of unsafe structures, to the diminution of the hazard of fire, or to the prevention of immoral displays, we find that the one ground upon which the town council may be thought to have acted is that the appearance of bill-boards is, or may be, offensive to the sight of persons of refined taste. That the promotion of aesthetic or artistic considerations is a proper object of governmental care will probably not be disputed. But so far as we are advised, it has never been held that these considerations alone will justify, as an exercise of the police power, a radical restriction of the right of an owner of property to use his property in an ordinary and beneficial way. . . .
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> . . . We are not here, however, concerned with the extent to which the legislative power may in the effort to protect the public safety or morals, regulate the manner of erecting or using bill-boards. The ordinance in question does not attempt such regulation, but undertakes

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control, in view of the express provisions for local implementation (*e.g.*, CAL. BUS. & PROF. CODE § 11506). Also, where CAL. CONST. art. XI, § 8 (the "home rule" clause) applies, even general state legislation would not limit the competence of a chartered city. See Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949).

[26] Max Factor Co. v. Kunsman, 5 Cal. 2d 446, 461, 55 P.2d 177, 184 (1936).

[27] 155 Cal. 318, 100 Pac. 867 (1909).

[28] Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 So. CAL. L. REV. 149, 150 (1954); National Advertising Co. v. County of Monterey, 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (1962).

[29] Such a prohibition would appear to be valid today, at least if part of comprehensive zoning regulations. Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d 270, 30 Cal. Rptr. 731 (1963), *appeal dismissed for want of a substantial federal question*, 376 U.S. 186 (1964).

> absolutely to forbid the erection or maintenance of any bill-board for advertising purposes. We have no doubt that this sweeping prohibition was beyond the power of the town trustees.[30]

There was no reference to protection of property values, and there is no evidence that the ordinance was accorded any presumption of validity. Even under the orthodox rule of *Varney & Green*, legislation that serves aesthetic ends will be valid if it also serves some kind of health-and-safety objective as well. There is nothing to the contrary in the *Varney* case, and, in general, the California courts seem to have been as generous in this regard as have courts in other states. In a case in which a San Francisco ordinance imposing a height limit on buildings in the Marina district was challenged, the court said:

> In our opinion there is no merit in appellants' further assertion that the ordinance was enacted solely for aesthetic purposes. On the contrary, the record shows that it was passed for safety, public convenience, comfort, general welfare, prevention of and spread of fire, for the conservation of sunlight and air, the prevention of congestion of streets due to overcrowding, as well as for aesthetic purposes.[31]

In most other respects as well, California seems to follow the pattern of the rest of the country regarding aesthetic controls. Accepting *Varney & Green* as good law, a recent opinion of the California Attorney General defends the questioned measure first in terms of the public safety and then on the basis of the general welfare, that is, community prosperity and the protection of property values.[32] The ruling in question was the decision of a city council to require curved streets in a new subdivision. As presented, the question assumed that the objective was aesthetic. Even if this was assumed, the Attorney General reasoned, curved streets might also contribute to traffic safety, by discouraging through traffic and fast driving. Therefore, even if the primary objective was aesthetic, the requirement was valid under the orthodox rule.

The opinion then goes on to declare that the requirement was also supported by general welfare considerations:

> Likewise, we believe that in many instances, the requirement that a subdivider put in curved streets could be upheld on principles of the "general welfare" of the citizens of the city. This would depend in the main upon the character of surrounding neighborhoods and perhaps master plans for city development. Though attractiveness is related to aesthetics, it may likewise be related to the economic well-being of the existing community. And, as pointed out, at least one appellate court has recognized economic considerations in determining whether a police regulation was reasonable. . . . Thus, where a city has been developing

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[30] 155 Cal. at 320.

[31] Brougher v. Board of Public Works, 107 Cal. App. 15, 23, 290 Pac. 140, 144 (1930).

[32] 43 CAL. OP. ATT'Y GEN. 89 (1964).

> highly attractive residential areas which include curved streets, it would not seem unreasonable to require that future developments in close proximity conform to like standards to stabilize or enhance property values in the area.[33]

Further recognition of the close relationship of the economic and aesthetic elements in land-use regulation appears in the opinion in one of the recent sign-control cases. The aesthetics question having been eliminated by stipulation, the court said obiter:

> We, therefore, are not called upon to consider whether or not certain early decisions in this state (which were written prior to the need for, or adoption of, comprehensive zoning plans) would require us to destroy the patterns sought to be created by local legislative bodies acting upon reports and studies laboriously compiled by their planning commissions. Today, economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future.[34]

The net result is that even though the *Varney* case still forecloses regulation for aesthetic objectives simply, the other two options or approaches (health and safety, and general welfare and property values) are available to the California lawyer who is called upon to defend aesthetic controls. As a practical matter, there are few such measures that counsel cannot justify on one ground or the other, and often on both.

The limited scope allowed to anything labeled aesthetic regulation is an exception, an anomaly. So far, the law reviews have shown more enthusiasm than the courts for elimination of the anomaly. For example, a 1956 law review note on the *Berman* and *Saveland* cases stated: "It would seem that today esthetic zoning is a valid exercise of the police power."[35] In another journal, in a full-dress treatment of the problem that appeared just the year after *Berman*, the author argued:

> Zoning restrictions which implement a policy of neighborhood amenity should be voided, if at all, not because they are for aesthetic objectives but only because the restrictions are unreasonable devices of implementing community policy. Whether, I repeat, an ordinance of this type should be declared invalid should depend upon whether in the particular institutional context the restriction was an arbitrary and irrational method of achieving an attractive, efficiently functioning, prosperous community—and *not* upon whether the objectives were primarily aesthetic. (Emphasis in the original.)[36]

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[33] *Id.* at 92.

[34] Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d. 270, 273, 30 Cal. Rptr. 731, 734 (1963).

[35] Note, *Esthetic Zoning—The Trend of the Law*, 7 W. RES. L. REV. 171, 178 (1956).

[36] Dukeminier, *Zoning for Aesthetic Objectives—A Reappraisal*, 20 LAW & CONTEMP. PROB. 218, 231 (1955).

And a 1964 note concludes:

> Since regulations based solely on aesthetic considerations present no greater danger of unreasonably stringent restrictions than other types of social and economic regulations, and because legislatures are in a better position than the courts to decide to what extent aesthetic controls are necessary and desirable, there seems to be no good reason for treating regulations based on aesthetic considerations differently than other types of social and economic regulations. Thus, instead of imposing limitations framed in terms of preserving property values or protecting the sensibilities of the average man, aesthetic regulations should be voided only if they are unreasonable, arbitrary, or capricious.[37]

Logic alone may not be enough to force state courts to reexamine older precedents, even though demonstrably based upon quite limited notions of the police power. That the courts still show some reluctance to express blanket approval of regulations designed to attain beauty simply for beauty's sake, does not mean that aesthetics legislation never or only rarely survives judicial scrutiny. The fact is that many courts regularly found it possible to uphold such measures long before *Berman*. By means of a modification of the traditional rule a proviso was added to the effect that aesthetic controls were permissible if the measure could somehow also be found to serve health and safety objectives.

Such a proviso is a back-handed acknowledgment of the public significance of aesthetics. Some of its applications might also be criticized as at best unrealistic. It is generally said, for example, that set-back lines requiring space between buildings advance the public health by admitting light and air and serve the public safety by limiting the spread of fire from one building to another. As abstract statements, such arguments are not implausible, but as a description of the actual objectives of most setback requirements, they apply more accurately to the industrial slums of the nineteenth century than to the modern suburban subdivision.[38]

It is not necessary to examine in detail all the varieties (unrealistic and worse) of health-and-safety arguments solemnly advanced by counsel in defense of land-use controls serving ends primarily aesthetic, and just as solemnly recited in judicial opinions upholding such measures. It is enough to say here, that "this reasoning became a judicial formula which allowed many courts to attenuate the rule against aesthetic legislation by finding dubious health and safety considerations in regulations where aesthetic factors were actually paramount."[39] Mr. Rodda's pre-*Berman* article summarized the situation as follows:

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[37] Note, 11 U.C.L.A. L. REV. 859, 867 (1964).

[38] Landels, *Zoning—An Analysis of its Purposes and its Legal Sanctions*, 17 A.B.A.J. 163, 164 (1931).

[39] 11 U.C.L.A. L. REV. at 862.

> Nominally, at least, the general rule today is the rule that aesthetic factors may be considered and given weight but that such factors are not in themselves sufficient. Few courts have directly stated a divergence from this rule but, in terms of the aesthetic results which may be accomplished, there has been such a great expansion that the rule is now largely a fiction.[40]

Indeed, it has been so obvious that the courts are now giving mere lip-service to the orthodox rule that Professor Dukeminier, admonishing his readers that "it is not proper to conclude from their language that courts do not know what is going on," seems to suggest that the courts are consciously upholding aesthetic legislation behind a rather thin camouflage of health and safety verbiage.

> Except in so far as the doctrine ensnares the unwary planner or judge who puts excessive faith in the plain meaning of words, it does not prevent any court from *holding* that community officials may zone for aesthetic objectives. But it seems to me that the doctrine may properly be criticized as meaningless theory, *i.e.*, it does not describe past court response nor enable one to predict future court response. (Emphasis in the original.)[41]

Notwithstanding such criticism, the fact remains that few courts have expressly abandoned the verbal formula of the accepted rule. What some courts have done is expressly to expand the terms of the formula. As already noted, the actual holding in *Saveland* and *Stover* appears to be that the police power extends to the protection of property values, and that aesthetic controls are therefore constitutional wherever they tend to preserve property values. Not only is this expanded version of the formula more realistic, but established police-power doctrine can be invoked in its support. Remembering that even the standard nineteenth-century summary of police-power objectives included "the general welfare," the formula now reads that regulation for aesthetic purposes is valid when it also serves the public health, safety or morals or, by advancing the prosperity of the community and protecting property values, serves the general welfare. The question remains whether courts generally will go on, as the Oregon court did in *Oregon City v. Hartke*, to recognize aesthetic regulation as valid without reference even to property values. Professor Dukeminier suggests that the "general

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[40] Rodda, *The Accomplishment of Aesthetic Purposes under the Police Power*, 27 So. CAL. L. REV. 150 (1954).

[41] Dukeminier, *supra* note 36, at 223. Some fairly recent fence cases demonstrate the confusion possible. In two, where fences were prohibited, Texas and Tennessee courts, each purporting to apply the orthodox rule, managed to reach opposite conclusions: City of Bellaire v. Lamkin, 317 S.W.2d 43 (Tex. Civ. App. 1958); City of Norris v. Bradford, 321 S.W.2d 543 (Tenn. 1959). In two, where fences were required, the Appellate Department of the San Diego County Superior Court seems to have reached inconsistent results: People v. Sevel, 120 Cal. App. 2d 907, 261 P.2d 359 (1953); People v. Dickenson, 171 Cal. App. 2d 872, 343 P.2d 809 (1959).

welfare" category might be expanded still further, and would seem, "to give the courts a ready-made word to use when and if they openly recognize the aesthetic factor."[42] In the *Oregon City* case, the court said:

> . . . there is a growing judicial recognition of the power of a city to impose zoning restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings. This change in attitude is a reflection of the refinement of our tastes and the growing appreciation of cultural values in a maturing society. The change may be ascribed more directly to the judicial expansion of the police power to include within the concept of "general welfare" the enhancement of the citizen's cultural life.[43]

The reluctance of the courts to accept the logic of the general police-power precedents, as expounded in the most recent aesthetics decisions and in the law reviews reflects the difficulty of defining the tasteful, the attractive, the beautiful. The courts cling to the old formula as a means of maintaining some control over local officials in an area where objective classifications and standards are particularly difficult to establish. It should be noted that the *Oregon City* case dealt with the relatively simple problem of exclusion of a use unsightly by almost any standard and did not involve the drawing of fine lines between different schools and styles of architecture. In view of their acceptance of aesthetic legislation in practice, if not in theory, courts generally would probably accept a new and more realistic formula if one could be devised. Protection of property values has been suggested as such a formula,[44] but this might still be unrealistic and misleading in many cases. It is certainly something less than complete and open acceptance of aesthetic regulation for its own sake.

There must be some limiting verbal framework, sententious but not too precise. The courts are reluctant to give local government *carte blanche* to regulate the external appearances of buildings and developments in any way a council, planning commission or other agency sees fit. Whether phrased in terms of property rights, or of opposition to coerced conformity, or of the liberty of the creative individual to define and pursue beauty in his own terms, there are valued freedoms involved. It may not always be a sufficient answer to tell the non-conformist that his remedy is in the town meeting or at the ballot box. The devotees of "modern" architecture, for instance, even with the support of the architectural profession, are probably

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42 *Id.* at 219 n.3.

43 Oregon City v. Hartke, 240 Ore. 126, —, 400 P.2d 255, 261 (1965).

44 *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81, 90 (1964). Protection of property values has its limits, see, *e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917).

a permanent minority, especially in a comfortable suburb.[45] However, neither personal nor property rights are absolute, and, as Mr. Landels said of zoning in general, local government is expected to protect its residents from "the blighting effect of non-conforming uses," and from " 'illegitimate and unfair non-conformity'."[46]

Admitting that effective aesthetic controls will restrict individual freedom of choice and action, and recognizing that good taste and aesthetic sensitivity cannot be guaranteed either for city officials or for judges, the concern of the courts to structure or define the scope and operation of such controls is understandable. The following is offered as a possible approach. The kind of "visual attractiveness" that would be constitutional for local government to enforce might be defined in terms of the relationship between the external appearance of a given use or structure and that of adjacent uses and structures. Beyond that, if there is anything desirable in the visual character, actual or potential, of the community and its natural setting, the appearance of the particular development could also be judged in terms of its relationship to that of the community as a whole and the surrounding landscape.

This relationship of exteriors or external appearances must not be negative; how far should it be required to be positive? Where a particular visual character is sanctified by history (Nantucket, New Orleans, Santa Fe) a high degree of conformity might be enforced,[47] but in many cases conformity might be too limited a goal. The word "compatible" suggests itself. The dictionaries define it as "capable of existing together without discord or disharmony," "accordant, consistent, congruent. . . ." Incompatibility would cover depreciation of property, but would not be limited to economic injury. The whole of planning and zoning might be defined as bringing together compatible uses and structures and keeping the incompatible separate. Aesthetic regulation is only a special case of land-use controls concerned with compatibility of visual character, of external appearances. It would be the responsibility of the local legislative body to develop the "compatible relationship" formula for that community, leaving it to the courts to strike down regulations for which no rational basis could be shown.

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45 "Modern" architecture received short shrift in Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963).

46 Landels, *Zoning—An Analysis of its Purposes and its Legal Sanctions*, 17 A.B.A.J. 163, 165 (1931).

47 Special "historic district" controls for Nantucket were approved in Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955); the Louisiana court upheld such controls for the Vieux Carré of New Orleans in City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953); similar controls in Santa Fé were held valid in City of Santa Fé v. Gamble-skogme, Inc., 73 N.M. 410, 289 P.2d 13 (1964).

The difficulty of spelling out specific regulations in precise statutory language is such that any serious attempt to impose aesthetic controls will almost necessarily require some delegation of authority to administrators. The problem of standards is not a matter merely of a subjective judicial unwillingness to trust local agencies and officials with too much discretion. Established constitutional principles require that standards be established to guide the exercise of delegated powers in any field. The practical question is, how definite and detailed must these standards be?

In the zoning field generally, as a New Jersey court phrased it, "fairly broad and generally expressed standards suffice."[48] The cases upholding architectural controls have not imposed any stricter rule for aesthetics legislation. In *Saveland*, for instance, the ordinance required that "exterior architectural appeal and the proposed plan of structure" not be so different from that of the immediate neighborhood "as to cause a substantial depreciation of property values of said neighborhood." The Wisconsin Supreme Court held that this language set a sufficient standard for the village authorities.[49] But even the Wisconsin court has refused to accept as adequate a reference in general terms to health, safety, convenience, prosperity and general welfare.[50]

Standards, apparently, need not be expressed in any particular form or set out in any particular part of the enactment. In one case, the court was satisfied with a recital of purposes. These included maintenance of the high character of community development and protection of real estate from impairment or destruction of value, and were supported by a reference to architectural principles and administered by a board composed of architects.[51] In another Wisconsin case even the preamble was resorted to for standards.[52]

Regarding standards for the exercise of delegated powers, the weight of California authority does not demand great detail or precision. Indeed, the California Supreme Court has said repeatedly that a delegating statute may be valid even though no standards are expressly prescribed. As early as 1907, in *Ex parte McManus*, the

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[48] Kirzenbaum v. Paulus, 57 N.J. Super. 80, 153 A.2d 847, 853 (1959).

[49] State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, —, 69 N.W.2d 217, 223 (1955).

[50] State *ex rel.* Humble Oil Co. v. Wahner, 25 Wis. 2d 1, 130 N.W.2d 304 (1964). Some state courts are more suspicious of delegation in the area of aesthetics and in zoning matters generally. See, *e.g.*, City of West Palm Beach v. State *ex rel.* Duffey, 168 Fla. 863, 30 So. 2d 491 (1947); Phillips Petroleum Co. v. Anderson, 74 So. 2d 544 (Fla. 1954).

[51] Reid v. Architectural Board of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963).

[52] Smith v. City of Brookfield, 272 Wis. 1, 74 N.W.2d 770 (1956).

court stated: "It may not be presumed that the authority conferred will be abused by the formulation of unreasonable or unjust rules, and from such presumption declare the act to be unconstitutional. On the contrary, the presumption is that the board will not act unreasonably or unfairly."[53] In other words, general standards will be implied, and the courts will interfere only where abuse of discretion is alleged.[54] In *Roussey v. City of Burlingame* an ordinance required council approval of changes in the boundaries or descriptions of lots within the city, but prescribed no standards for this approval or disapproval. The District Court of Appeal applied the majority rule and interpreted the ordinance as conferring, not power to act "arbitrarily or whimsically," but "a legal discretion, the power to grant or deny the petition in the honest exercise of a reasonable discretion."[55]

The permissive attitude of the California courts in this matter of standards undoubtedly makes it easier to draft legislation delegating regulatory powers, and this is true, presumably, of aesthetic control measures. While it may be difficult to devise some fairly definite standards for aesthetic regulation in some situations, it is easiest to do so with reference to a specific community and particularly to one that has some established visual character.

"Visual character" may be employed as a standard for architectural control if the community, in fact, has some identifiable character. As was said in a 1960 law review article, "[t]he historic preservation cases indicate that where architectural controls are imposed on an area where exterior design is consistent and discernible, the courts will construe the standards in their factual context and find them sufficient if they are understandable."[56] An ordinance requiring advance approval of plans "in order to maintain the atmosphere" of the town was upheld where the necessary "factual context" existed and was shown to the court by photographs.[57] Where

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[53] 151 Cal. 331, 336, 90 Pac. 702, 704 (1907).

[54] The cases up to People v. Globe Milling Co., 211 Cal. 121, 296 Pac. 3 (1930) are summed up in a note on that case in 19 CALIF. L. REV. 448 (1931). As indicated in the note, there is a minority position in California, but the most recent state supreme court decision is in accord with *McManus* and the California majority; *In re* Petersen, 51 Cal. 2d 177, 331 P.2d 24 (1958). A recent decision supporting the minority view is People v. Perez, 214 Cal. App. 2d 881, 29 Cal. Rptr. 781 (1963), but, as a decision only of the Appellate Department of the Alameda County Superior Court, it hardly adds much precedential weight to the minority view. Unfortunately it has been cited in at least one standard treatise apparently as significant authority; 8 MCQUILLIN, MUNICIPAL CORPORATIONS 159, n.26 (3d ed., 1965 rev. vol.). It should be noted that the appellate department of a California superior court reviews only decisions of the municipal court in the county and does not hear appeals from its own trial departments.

[55] 100 Cal. App. 2d 321, 324, 223 P.2d 517, 519 (1950).

[56] Anderson, *Architectural Controls*, 12 SYRACUSE L. REV. 26, 46 (1960).

[57] Town of Deering *ex rel.* Bittenbender v. Tibbetts, 105 N.H. 481, 202 A.2d 232 (1964).

a very small, half-developed community was a hodge-podge of styles lacking any consistent character, however, the requirement that new construction be "of early American or of other architectural style conforming with the existing residential architecture and with the rural surroundings" was held insufficient.[58]

In the fully-developed town, as Professor Anderson observed, architectural review ordinances commonly seek to control excessive dissimilarity; in a city of new subdivisions, prevention of excessive similarity is the objective.[59] Parenthetically, the "compatible relationship" formula suggested above would seem to cover both situations. But neither similarity nor dissimilarity offers a complete solution to the problems presented by a community that is at least partially developed but lacks consistent character.

The larger and more complex the community, the more difficult it will be to formulate standards for aesthetic controls. A simple reference to "atmosphere" or even to "compatibility" will hardly suffice for San Jose, much less Los Angeles. This is not to say, however, that aesthetic regulation is any less desirable or less necessary in large and complex urban centers than in suburbs.

One answer for the city that lacks any over-all visual character might be to try to create such a character not all at once but in particular parts of the city as opportunity offers. An urban renewal project, for instance, might be such an opportunity. A "cluster" or "planned community" development, where architectural controls are accepted by the developer as part of the special zoning treatment involved, might be another. Given such a project or development as a reference point, it would hardly seem unreasonable to require any subsequent new construction on adjoining properties to be "compatible" in appearance. Such an approach implies some agreement on general standards and objectives, and preparation and defense of aesthetic controls would be facilitated by including visual character in the city's planning. To quote Professor Anderson: "Certainly the existence of a comprehensive plan for community appearance should increase the likelihood of judicial approval of standards designed to control architecture."[60] Beauty may not be easily attainable, but surely "it is not irrational for those who must live in a community day by day to plan their physical surroundings in such a way that unsightliness is minimized."[61]

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[58] Hankins v. Borough of Rockleigh, 55 N.J. Super. 132, 150 A.2d 63 (1959).

[59] Anderson, *supra* note 56, at 30.

[60] *Id.* at 48. A "visual survey" along the lines suggested in Williams, *Urban Aesthetics*, PLANNING (1953) at 56, might serve as the basis for such a plan. For new approaches and vocabulary see, *e.g.*, LYNCH, IMAGE OF THE CITY (1960).

[61] Oregon City v. Hartke, 240 Ore. 126, 400 P.2d 263 (1955).

Of aesthetic regulation in general, McQuillin's well-known treatise now acknowledges that "undoubtedly in this respect the law has undergone a decided change in recent years,"[62] and Mr. Yokley has written that "with ever-increasing frequency, the courts lean more favorably towards a consideration of esthetics as a major factor in the enactment of zoning ordinances under the police power."[63] At the present time, the city that wishes to exercise some kind of aesthetic control appears to have three options. The easiest, because established in the cases, is to draft and justify the regulation in the traditional health and safety terms. Almost any such verbiage apparently will serve as a sop to appease the judicial Cerberus, at least where no broad delegation is involved. Secondly, the preservation of property values has been given favorable consideration by the courts lately as an acceptable basis for aesthetic controls. The third approach is that of the non-judicial authors cited, who argue that police power does extend to aesthetics, and that particular justification, in terms of health and safety or property values, is so much expendable verbosity. If the ordinance must be defended, let it be defended in terms of aesthetics as a legitimate concern of the community under the police power. This last approach is the most satisfying intellectually, and hopefully the courts will continue to progress toward its open recognition and support.

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62 8 McQUILLIN, MUNICIPAL CORPORATIONS 75 (3d ed., 1965 rev. vol.).
63 1 YOKLEY, ZONING LAW & PRACTICE 28 (3d ed., 1965).